Exhibit **A**

Excerpt from ACA's

Digital Must Carry **Comments**

Pages *4-1* 5

(filed June *8*, 2001)

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of Digital Television Broadcast Signals	)	CS Docket No. 98-120
	)	
Amendments to Part 76 of the Commission's Rules	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	
	)	
Local Broadcast Signal Carriage Issues	)	CS Docket No. 00-96
	)	
Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals	)	CS Docket No. 00-2

Comments of the
American Cable Association

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Christopher C. Cinnamon
Kurt J.H. Mueller
Rhondalyn D. Primes
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for American Cable Association

June 8, 2001

I. ANALYSIS

A. Examples *of* retransmission consent tying arrangements forced on smaller market cable operators.

This section provides recent examples of retransmission consent Lying arrangements forced on smaller market cable operators by Disney/ABC, Fox Network/News Corp., Hearst-Argyle and GE/NBC. Each case demonstrates the overwhelming market power of network broadcasters over independent cable, and the high costs of retransmission consent tying on smaller market cable systems and their customers.

As a precaution, we present these examples in sanitized form Independent cable companies are keenly aware of the power wielded by companies like Disney/ABC, Fox Network/News Corp., and others. Small cable operators fear retribution. In the words of one small cable veteran, "They have us in a bind, and they will squeeze us." Still, these examples describe actual carriage ierms forced on independent cable companies in the past 24 months To obtain more specific information will require Commission protection.[30]

1. Disney/ABC

The merger *of* the Disney companies and Capital Cities/ABC aligned Disney's satellite programming assets with ABC owned and operated network stations in many markets. Disney's demands to tie retransmission consent *for ABC to* carriage of Disney-affiliated programming promptly followed the merger.

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[30] For example. the Commission might seek more specific information and protect it from disclosure under 47 CFR § 0 *459*

Last year's retransmission consent dispute between Disney/ABC and Time Warner garnered much attention. That case demonstrates the market power wielded by owners of broadcast licenses and satellite programming. Even the impressive resources and resolve of Time Warner had to yield to the tremendous pressure that followed deletion *of* ABC from certain Time Warner cable systems for just two days in May 2000.

If Disney/ABC has leverage like that over Time Warner, how do independent cable companies fare in the retransmission consent process? As the following two examples show, they do not stand a chance.

a. Tying of retransmission consent for ABC in one market to carriage *of* Soapnet in other markets.

One ACA member faced the following situation in seeking consent to retransmit an O&O ABC station This case provides a dramatic example of the power of Disney *to* use retransmission consent tying to raise the costs of cable in smaller markets.

The small cable company operates several small systems in a number of states. In one market served by the cable company, it serves a few thousand customers. In another area of the company's operations, several states removed, it serves tens of thousands of customers. In the market where the company serves a few thousand customers, the cable operator obtains ABC programming from a station owned by Disney Enterprises Inc.

The O&O ABC station elected retransmission consent. The cable operator was then directed to deal with a representative for Disney cable networks in a distant city. There was no further contact with the local broadcaster. All communications were with Disney cable network personnel. Disney refused to grant retransmission consent unless the cable operator launched, and paid for, a new satellite network, Soapnet.

Disney did not limit its demands to launching Soapnet to the market served by the O&O ABC. Again, in that market the cable operator serves a few thousand customers. Instead. Disney conditioned retransmission consent to the launch of Soapnet in a market several states away, where the cable operator serves several times that many customers.

To obtain consent *to* carry essential ABC programming in one market, Disney gave the small cable company no choice but to carry Soapnet in other markets. The Soapnet contract extends for a number of years beyond the 2000 - 2002 election period. Aggregate payments exceed a quarter million dollars. A representative of the cable operator stated "No way would we have agreed to carry Soapnet, but we needed ABC programming in that one market."

This case demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to force carriage *of* undesired programming.
- Using retransmission consent rights in one market to increase the costs *of*

cable services in other markets.

- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following example demonstrates another way that Disney uses retransmission consent to force unwanted programming and costs on smaller market cable customers.

b. Tying **of** retransmission consent for **ABC** in one market to company-wide carriage ***of*** the Disney Channel on basic.

An ACA member serving subscribers in small communities in several states faced the following situation in seeking consent to retransmit an O&O ABC station. For the 2000 - 2002 election period, the broadcaster elected retransmission consent. then sent the cable operator a three-year retransmission consent agreement. Within 30 days, the cable operator returned the agreement to the broadcaster with minor comments. During this same period, Disney Channel representatives approached the cable operator to renegotiate terms of carriage for the Disney Channel.

The broadcaster then declined *to* execute the retransmission consent agreement it had previously offered to the cable operator. Instead, the broadcaster granted rolling 30-day extensions of retransmission consent. It then became clear to the cable operator that the broadcaster would not, or could not, execute the three-year agreement that it had originally provided, until the Disney Channel concluded negotiations.

At issue is carriage of Disney on basic. The cable operator currently offers the Disney Channel as a premium service. The cable operator bases this decision in part on customer demand and in part on cost – the Disney Channel charges one of the highest per subscriber license fees of any programming carried by the cable operator. Currently less than 10% of the cable operator's customers request the Disney Channel. Those customers that want the channel pay extra. Those customers that do not. pay less.

Disney Channel is demanding company-wide carriage of Disney on basic. In other words, as a condition of obtaining a settled retransmission agreement for ABC in one market, Disney will require all basic customers in all markets to pay for the Disney Channel. Disney's proposal would result in substantial increases in the cost of cable in each of the smaller markets in question. The cable operator estimates that company-wide, Disney's proposal would increase programming costs by nearly $1.5 million per year.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Disney/ABC over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.
- Control of retransmission consent rights by satellite programming entities

instead *of* the broadcast licensee.

As described in the next example, Fox Network/News Corp. is employing similar tactics

2. Fox Network/News Corp.

Tying of retransmission consent for Fox Network *to* carriage of Fox Sports, Fox News, FX, National Geographic Channel, and Fox Health Channel.

News Corp. controls O&O Fox Network broadcast licensees, along with multiple satellite programming services. ACA members are increasingly facing costly tying arrangements as a condition of carriage of O&O Fox Network stations

An ACA member serving small communities in several states faced the following conduct by Fox. This case provides a disturbing example *of* the network owner's manipulation of the retransmission consent process and its disregard for the consequences on smaller market cable systems and their customers

Shortly before the 2000 – 2001 retransmission consent election cycle began, the cable operator received a rate increase notice from a Fox regional sports network. During a period where the inflation rate was about 3%, Fox Sports sought a rate increase of over 75%. The cable operator informed Fox Sports representatives that it could not carry the network at that cost.

As an alternative, Fox proposed carriage of Fox Sports at a lower rate, so long as the cable operator agreed to carry, and pay for, Fox News, FX, and the

National Geographic Channel. The cable operator declined this alternative as well, due to the cost and the difficulty in reconfiguring channel line-ups in its smaller systems.

While these negotiations were underway, an O&O Fox Network station carried by the cable operator delivered a retransmission consent election for the 2000 - 2002 election period. In earlier election periods, the cable operator and the station had promptly concluded negotiations for mutually acceptable terms of carriage. The cable operator received no indication initially that the retransmission consent process would differ from before.

When the negotiations with Fox Sports deadlocked, however, the Fox team brandished the retransmission consent lever. Months into the negotiations. Fox Sports representatives took the position that if the cable operator did not agree to carry Fox Sports under one of the two alternatives proposed by Fox, then the Fox broadcast licensee would not grant retransmission consent.

Faced with the loss of essential broadcast programming, including local interest programming carried exclusively on the Fox broadcast station, the cable operator had no choice but to accept Fox's deal. The cost to subscribers? The cable operator estimates at least an additional $1.5 million per year.

Unfortunately, the story did not end there. To add insult to injury, after the cable operator agreed to the terms of carriage for Fox Sports, Fox took the position that retransmission consent would not be part of the deal unless the cable operator also carried yet another additional satellite network – the Fox

Health Channel – at a rate 100% higher than the previous year.

It is important *to* note that during the same period, the cable operator received a retransmission consent election from a Fox Network affiliate, not an Fox O&O, in an adjacent market. No tying demands were made by the affiliate, and the parties promptly concluded negotiations.

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Fox Network/News Corp. over independent cable companies:

- Using retransmission consent rights in one market to increase the costs of cable services in many markets.
- Using retransmission consent rights in one market to force carriage of satellite services in many markets.
- Control *of* retransmission consent rights by satellite programming entities instead of the broadcast licensee.

3. Hearst-Argyle/ABC

Tying **of** retransmission consent for **ABC** to carriage **of** Lifetime.

Hearst-Argyle controls multiple broadcast licenses and satellite programming services including Lifetime. ACA members have faced widespread use *of* tying arrangements by Hearst-Argyle with costly consequences for smaller market cable systems and their customers. An ACA member serving less than 2,000 customers faced the following situation,

The cable operator obtained ABC programming in its market from an ABC affiliate controlled by Hearst-Argyle Television Inc. The broadcaster elected retransmission consent for the 2000 - 2001 election cycle. In earlier cycles, representatives of the cable operator and the station had promptly concluded agreements for retransmission consent on mutually agreeable terms. Not the case during the 2000 - 2001 election cycle. The difference? Lifetime representatives took over negotiations. Hearst Corp. and The Walt Disney Company reportedly own Lifetime.

Lifetime's representative proposed the following alternative: Put on Lifetime and pay $0.30 per customer per month or pay $0.50 per customer per month for retransmission consent for ABC only. As the cable operator served less than 2,000 customers and it had no choice but to carry ABC network programming, Lifetime had no incentive to negotiate. And it did not.

As a consequence of the cost increases related to forced carriage of Lifetime, a channel that no customer asked for, the cable operator had to institute a rate increase of 5%.

The small cable operator feels that abuse of retransmission consent by companies like Hearst-Argyle is undermining his business. He remarked, "we have a right to make the business decisions to program our systems, and the network conglomerates are taking that away. It feels like blackmail to put another channel on to get essential broadcast programming that's free over the air."

This situation demonstrates three consequences of the overwhelming market power of media conglomerates like Hearst-Argyle over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services in smaller markets.
- Using retransmission consent rights to force carriage of undesired satellite services in smaller markets.
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

The following examples show that GE/NBC is employing similar tactics.

4. GE/NBC

Multi-industry conglomerate GE controls NBC stations in many markets along with several affiliated satellite programming services. ACA members are facing increasing demands by O&O NBC stations to carry additional satellite programming as a condition of retransmission consent, with costly consequences for smaller market cable customers.

a. Tying of retransmission consent for NBC/ refusal to deal with small operator competing with major MSO.

One ACA member described the following situation. The cable operator operates one small system serving less than 2,000 customers. The system competes *with* a top three MSO. The MSO's system *carries* both the *in-market* NBC affiliate, and an O&O NBC station from an adjacent market. The small operator carries the in-market NBC affiliate and sought consent to carry the adjacent O&O NBC station as well.

A representative of the cable company contacted the senior executive at the station. After initial conversations, the cable operator was informed that all discussion must take place with NBC cable network representatives in a distant city. NBC cable then conditioned carriage of the broadcast signal on the following:

- Carriage of, and payment for, MSNBC.
- Carriage of, and payment for, CNBC.
- Carriage of Valuevision.
- Payment of a substantial multi-year surcharge for additional Olympic coverage on MSNBC and CNBC.

The small cable operator indicated that it could not accommodate the additional channels and cost. NBC cable refused to negotiate further. As a result, the cable operator still does not offer the NBC station offered by its major MSO competitor.

b. Tying of retransmission consent for NBC to carriage of MSNBC, CNBC, and payment of Olympics surcharge.

Another ACA member faced a similar situation in dealing with an O&O NBC station in another market. As conditions of carriage of the NBC broadcast signal for three years, the cable operator was required to sign multi-year agreements to carry MSNBC. CNBC, Valuevision. and pay a substantial surcharge for the Olympics.

This situation provides a telling example of how corporate parents are supplanting broadcast stations in the retransmission consent process. The representative of the cable operator handling this negotiation had developed over the years a good working relationship with the senior management of the broadcast station. But in the 2000 – 2001 election cycle, the station did not participate in the negotiations. NBC cable network representatives reportedly stated that they now spoke for the station. The station's general manager reportedly confided that the "station was a pawn", and he could do nothing.

This situation demonstrates three consequences of the overwhelming market power *of* media conglomerates like GE/NBC over independent cable companies:

- Using retransmission consent rights to increase the costs of cable services for smaller cable systems.
- Using retransmission consent rights to force carriage of satellite services
- Control of retransmission consent rights by satellite programming entities instead of the broadcast licensee.

For ACA members, the above examples of retransmission consent tying provide just a glimpse of increasing marketplace failure. When seeking retransmission consent for network programming from companies like Disney, Fox, Hearst-Argyle and NBC, independent cable operators have little or no bargaining power. The concept of "retransmission consent negotiations" does not apply. Smaller cable companies must deliver network programming to their customers, and the in-market network broadcaster has a virtual monopoly over the service. The media conglomerates discussed above are fully exploiting their monopoly power through retransmission consent tying.

The consequences? Forced carriage of unwanted programming, higher *costs* to consumers, and decreased programming diversity. These problems are exacerbated by onerous nondisclosure terms imposed as part of retransmission consent tying arrangements, shielding the conduct of network owners from scrutiny.

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. **20554**

In the Matter of

Petition for Inquiry Into
Retransmission Consent Practices

MB Docket No

To: The Commission

PETITION FOR INQUIRY
INTO RETRANSMISSION CONSENT PRACTICES

FIRST SUPPLEMENT

I. INTRODUCTION AND SUMMARY

On October 1, 2002, ACA filed with the Commission a *Petition for Inquiry into Retransmission Consenf Practices.'* The Petition asks the Commission to investigate how a handful of network owners and major affiliate groups are abusing retransmission consent in dealing with smaller cable operators This Supplement provides the Commission with additional, ongoing examples of retransmission consent abuse by network owners and major affiliate groups. Media conglomerates like Disney/ABC, Fox/News Corp., and others continue to force "take it or leave it" tying arrangements and other unreasonable and costly terms on small cable operators. This continuing and

[1] *Petition for Inquiry into Retransmission Consent Practices,* American Cable Association (filed October 1, 2002) ("Petition")

pervasive abuse of market power against the small cable sector underscores the need for prompt Commission action.

This Supplement contains eleven current examples of retransmission consent tying arrangements being forced on small cable operators around the country. From California to Florida *to* Minnesota to Texas, small cable operators report that network owners like Disney/ABC and Fox/News Corp. are tying consent to carry a local network broadcast station to carriage of, and payment for, one or more channels of affiliated satellite programming. The reports contained in this Supplement include statements from system owners, managers, one elected official, and a local cable Commission. Each of the statements attests to "take it or leave it" tying arrangements forced on small operators. Each of these statements also describes the public interest harm caused by this exploitation of local broadcast licenses. Uniformly, small cable operators report how retransmission consent abuse results in increased costs for cable services and decreased consumer choice and program diversity.

The examples below show how media consolidation and abuse of market power have upended the intent of the retransmission consent laws In implementing Section 325, the Commission unequivocally slated that "the statutory goals at the heart of Sections 614 and 325 [are] to place local broadcasters on a more even competitive level and thus help preserve local broadcast service to the public,"[2] and that retransmission consent is *to* provide "incentives for both parties to come to mutually-

[2] In *the* Matter *of Implementation of* the Cable Television Consumer Protection *and* Competition *Act of 1992;* Broadcast Signal Carriage Issues, Memorandum Opinion and Order. 9 FCC Rcd. 6723 (1994) *("1994* Broadcast *Signal Carriage Order")* at ¶ 104

beneficial arrangements."[3] As shown in this Supplement, when small cable operators confront network owners. retransmission consent is anything but local, and anything but mutually beneficial.

These examples also portray the network owners' stark disregard for local needs and interests Cable operators report explaining to executives from Disney or Fox that their small town customers do not want the additional programming and do not want higher cable rates. The executives from distant corporate offices could care less. For these conglomerates, revenue goals for satellite channels have displaced localism and genuine public service to smaller communities

No legitimate public interest basis exists for this conduct. As requested in the Petition, the Commission should initiate an inquiry into the pervasive abuse of market power and the harm resulting in markets served by smaller cable systems

Summary of Petition for Inquiry. ACA's Petition asks the Commission to investigate the retransmission consent tying arrangements forced on smaller market cable companies by a few media conglomerates. The Petition follows the Commission's express recognition of this serious issue in the *Digital Must Carry Order* In that Order, the Commission acknowledged small cable's "important concerns" concerning retransmission consent tying and committed "to monitor the situation with

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(emphasis added)

[3] *Id.* at ¶ 115 (emphasis added); See *also* ¶ 107 (interpretation of Section 325 guided by maintaining ability of broadcasters and cable operators to negotiate mutually advantageous arrangements).

respect to potential anticompetitive conduct by broadcasters in this context."[4] Upon a showing that tying arrangements harm small cable operators and their subscribers, the Commission would "consider appropriate courses of action."[5]

As described in the Petition, when dealing with small cable operators, powerful players like Disney/ABC, Fox/News Corp., GEINBC, and Hearst-Argyle have converted retransmission consent negotiations into one-way conversations driven by corporate strategies to increase satellite programming revenues. As a condition of access to free, over-the-air, local news and network programming, these conglomerates force small cable operators and their customers to pay for a wide range of satellite services and accept other onerous conditions of carriage. These tying arrangements and carriage conditions harm smaller cable companies and their customers by increasing basic cable costs and decreasing programming choices

The Commission has ample authority to investigate retransmission consent tying and other abuses of market power As described in the Petition, this conduct:

- conflicts with the intent and purpose *of* Section 325 to promote mutually beneficial carriage arrangements;[6]

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[4] *In the Matter of Carriage of Digital Television Broadcast Signals,* CS Docket No. 98-120, *First Reporf and Order and Further Notice of Proposed Rulemaking*, FCC 01-22 (rel. January 23. 2001) *("Digital Must Carry Order*") at ¶ *35* (referencing comments of the Small Cable Business Association, the former name of ACA), ¶ 121, and *Final Regulatory Flexibility Analysis,* ¶ 20

[5] *Id.*

[5] 47 USC § 325(b)(1)(A); *In the Matter of implementation of the Cable Television Consumer Protection* and *Competition Act of 1992 Broadcast Signal Carriage Issues, Reporf and Order,* 8 FCC Rcd. 2965 (1993) at ¶ 173; *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast*

- adds substantial costs to basic cable service in smaller markets;[7] and
- may constitute unauthorized changes in control when retransmission consent policies for local broadcast licensees are controlled by affiliated satellite programming entities.'

The Petition and this Supplement provide the Commission with substantial evidence of the harms caused by the pervasive abuse of retransmission consent by network owners and major affiliate groups in their dealings with small cable operators.

American Cable Association. ACA represents nearly 1,000 independent cable companies that serve about 7.5 million cable subscribers, primarily in smaller markets and rural areas ACA member systems are located in all 50 states, and in virtually every congressional district The companies range from family-run cable businesses serving a single town to multiple system operators with small systems that focus on small markets. About half of ACA's members serve less than 1,000 subscribers All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets. Many ACA members have been on the receiving end of retransmission consent tying and face increasing retransmission abuses in the current round of negotiations.

Signal Carriage Issues, Memorandum Opinion and Order, 9 FCC Rcd. 6723, (1994) ("1994 Broadcast Signal Carriage Order") at ¶¶ 22, 104, 107, 115. See *also* Petition at 8-11.

[7] 47 USC § 325(b)(3)(A). See *also* Petition at 12-13.

II. ADDITIONAL EXAMPLES OF CURRENT, ONGOING RETRANSMISSION CONSENT TYING

We provide below summaries of eleven reports of retransmission consent tying demands by Disney/ABC and Fox/News Corp. These examples show.

- Affiliated programming entities taking control *of* retransmission consent rights formerly exercised by local broadcasters.
- The network owners' "take it or leave it" approach to retransmission consent with small cable operators.
- Explicit tying of retransmission consent to carriage of one or more affiliated satellite network.
- Complete disregard for local needs and interests in smaller markets.

This Supplement provides a telling glimpse into the widespread public interest harms in smaller markets caused by unprecedented media consolidation and unbridled use of market power. We begin with Disney/ABC.

A. Disney/ABC

ACA members report ubiquitous abuse of retransmission consent in dealing with Disney for consent to carry Disney/ABC O&O stations. The following examples describe Disney's consistent approach when dealing with small cable operators - explicit "take it or leave it" tying arrangements. and no concern for local needs and interests.

[8] 47 USC § 301(d) See *also* Petition at 13-14

Matrix **Cablevision/KGO** – San Francisco

Matrix Cablevision is a quintessential small cable operator. The family-owned company operates two cable systems serving small communities on the fringes of the San Francisco DMA. Combined, the systems serve less than 1,200 subscribers. Mr. Brad Daniel owns, operates, and maintains the cable systems. Exhibit 1 contains a letter from Mr Daniel explaining his dealings with Disney/ABC [9]

KGO is the ABC station serving the San Francisco DMA. Disney Enterprises, Inc. owns KGO. Matrix Cablevision's systems have carried KGO for many years. Mr. Daniel reports that a Disney executive recently contacted him regarding retransmission consent for KGO. The representative stated to Mr. Daniel that his systems must carry Disney-owned SoapNet to obtain consent to carry KGO. Mr. Daniel informed the Disney representative that his subscribers did not want SoapNet.[10] Disney's response? If Matrix Cablevision did not add SoapNet, it would lose KGO [11]

Catalina Cable **TV/KABC** – Los Angeles

Catalina Cable TV operates the cable system on Catalina Island, California. The system serves fewer than 1,500 subscribers and falls within the Los Angeles DMA. Mr. Ralph Morrow owns and operates the system Mr Morrow is also the elected mayor of the Town of Avalon, California, placing him on the front lines of defending the public

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[9] Exhibit 1, letter dated November 18, 2002, to Ms. Emily Denney, Cinnamon Mueller, from Mr. Brad Daniel, President, Matrix Cablevision, Inc.

[10] *Id.*

[11] *id.*

interest in his community. Exhibit 2 contains a letter from Mr. Morrow explaining his dealings with Disney/ABC.[12]

KABC is the ABC station serving the Los Angeles DMA. Disney Enterprises, Inc owns KABC To obtain retransmission consent for KABC, Mr Morrow could not deal with KABC personnel. Instead, he was routed to programming executives at Disney. As a condition of retransmission consent, Disney has insisted that Mr. Morrow's small system carry SoapNet As explained by Mr Morrow in his letter, "ABC forced us to put the SoapNet on."[13]

Disney has also demanded that Catalina Cable move the Disney Channel to basic. The demographics of Catalina Island include a substantial population *of* retired or semi-retired persons, hardly the Disney Channel's target demographic. As explained by Mr. Morrow, moving Disney to basic would substantially increase basic rates. Disney would not negotiate. Mr. Morrow states, "<u>Disney was unwilling to compromise or work with ine in any way whatsoever</u> ."[14]

StarVision/ WTVD – Raleigh Durham

StarVision operates a small cable system serving Clinton, North Carolina, and surrounding Sampson County The area falls within the Raleigh Durham DMA. The system serves rural portions of the DMA between large systems operated by Time Warner and Charter Communications. Exhibrt 3 contains a report from Mr. Larry King

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[12] Exhibit 2, letter dated November 24, 2002, to the American Cable Association, from Mr. Ralph J. Morrow, Jr , Catalina Cable TV Co.

[13] *Id.*

of Starvision that explains his dealings with Disney/ABC.[15]

WTVD is the ABC station serving the Raleigh Durham area Disney Enterprises, Inc owns WTVD To obtain retransmission consent for WTVD, Mr King could not deal with WTVD personnel Instead, he was directed to a representative of ABC Network Group Mr. King reports that as a condition of retransmission consent for WTVD on his small system, Disney demanded one of the following:

- Carriage of the Disney Channel, Toon Disney, and Soap Net; or
- Payment of $0 70 per subscriber per month for the local broadcast station only

As reported by Mr. King, Disney "will not budge" from this position[16]

The cash for carriage "alternative" is a sham National ABC feeds via satellite are available for a fraction of the cost[17] But Mr. King could not carry an alternative ABC, because WTVD is entitled to block this transaction through the network-nonduplication and syndicated exclusivity regulations.

As Mr King points out, Disney's conduct results in higher costs for basic services and unwanted programming on his system[18]

[14] *Id.*

[15] Exhibit 3, report dated November 25, 2002, to the American Cable Association, from Mr. Larry King, StarVision.

[16] *Id.*

[17] For example, KMGH-TV. an ABC affiliate in Denver, is available via satellite for $0.15 per subscriber per month.

Mid-Coast Cable Television/KTRK – Houston

Mid-Coast Cable Television operates two systems that serve five small communities located on the Gulf of Mexico. The systems serve about 6,400 subscribers in the Houston DMA. Mr. Wayne Neal is Vice President and General Manager of the systems Exhibit 4 contains Mr. Neal's report of his dealings with ABC/Disney [19]

KTRK is the ABC station serving the Houston DMA. ABC Cable Network Group controls both KTRK and Disney's satellite channel. To obtain retransmission consent for KTRK, Mr. Neal reports that he has been required to deal with representatives from the Disney satellite programming side of the ABC Network Group's business. In the last two rounds of retransmission consent (1996 & 1999). Mr. Neal reports that Disney tied retransmission consent first to carriage of ESPN II, and then *to* SoapNet In this round, Disney is tying carriage of the Disney Channel on basic as a condition of consent to carry KTRK. Carriage of the Disney Channel would increase the costs of basic cable at least $0 85 per month for each customer. Mr Neal states that 'our customers are happy without Disney."[20] Adding Disney to basic would force more than 6.400 customers to pay for something they "apparently do not want."[21]

Disney has also proposed $0.70 per customer per month for KTRK only. The

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[18] *id.*

[19] Exhibit 4, letter dated November 19, 2002. from Mr. Wayne Neal, Vice President and General Manager. Mid-Coast Cable Television. L P.

[20] *id.*

[21] *Id*

cash "alternative" is a sham. A satellite feed of ABC is available at a fraction of the cost, and the KTRK signal is available with a rooftop antenna for free. Of course, KTRK will use network nonduplication and syndicated exclusivity to block a competitive ABC service.

Mr. Neal sums up his situation as most small cable operators do – "This has got to stop somewhere. Neither our customers nor us can afford it."[22]

As the reports on Disney/ABC demonstrate. the problems of retransmission consent tying pervade all markets where Disney controls broadcast licenses and where small cable operators serve customers. As discussed below, the same goes for Fox O&O markets

B. **Fox/News** Corp.

ACA members report extensive abuse of retransmission consent in dealing with Fox and Fox Cable Networks. The following examples show Fox's consistent approach to dealing with small cable operators - explicit "take it or leave it" tying arrangements and complete disregard for local needs and interests.

Catalina Cable **TV/KTTV Fox – Los** Angeles

Catalina Cable TV operates the cable system on Catalina Island, California The system serves fewer than 1,500 subscribers and falls within the Los Angeles DMA. Mr. Ralph Morrow owns and operates the system. Mr. Morrow is also the elected mayor of Avalon, California, placing him on the front lines of protecting the public interest.

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[22] *Id*

Exhibit 2 contains a letter from Mr. Morrow describing his dealings with Fox.[23]

KTTV is the Fox station serving the Los Angeles DMA. Fox Television Stations, Inc. owns KTTV The same owner controls KCOP, the UPN affiliate in the Los Angeles DMA. To obtain retransmission consent for KTTV. Mr. Morrow must deal with representatives of Fox Cable Networks. Mr. Morrow reports that Fox is explicitly tying retransmission consent for KTTV to carriage of the new Fox Digital Nets. Fox is also demanding substantial increases to rates for Fox Sports Channels 1 and 2, which are also tied to retransmission consent Mr. Morrow explains, "I have not signed the contracts yet. It is still out of the question. It will FORCE me to raise my rates."[24] Yet if he does not sign the contracts for costly Fox Sports channels his customers may lose the local Fox station.

Griffin **Broadband/KTTV Fox – Los Angeles**

Griffin Broadband operates a small cable system serving the Ariny base located in Fort Irwin, California. Mr Phil Trainmell serves as Executive Vice President of Griffin Broadband. Exhibit 5 contains a letter to Media Bureau Chief Ken Ferree that describes the consequences of retransmission consent tying for the business.[25]

KTTV is the Fox station serving the Los Angeles DMA Fox Television Stations,

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[23] See Exhibit 2, letter dated November 24, 2002, to the American Cable Association, from Mr. Ralph J Morrow, Jr , Catalina Cable TV Co.

[24] *Id.*

[25] Exhibit 5, letter dated October 21, 2002, to Mr. W. Kenneth Ferree. Bureau Chief, Media Bureau, FCC, from Mr. Phillip W. Trammell, Executive Vice President, Griffin Broadband Communications.

Inc. owns KTTV To obtain retransmission consent for KTTV, Mr Trammel was directed to representatives of Fox Cable Networks Fox expressly tied retransmission consent for KTTV to carriage of the National Geographic Channel. As a consequence, due to limited channel capacity, Griffin Broadband was forced to scuttle plans to launch a desired satellite channel not affiliated with Fox/News Corp.

In other words, Fox wins; independent programmers and program diversity lose

Plantation Cablevision, Inc./WAGA – Atlanta

Plantation Cablevision operates a small system serving about 3,000 subscribers in rural portions of Greene County, Georgia Greene County falls within the Atlanta DMA. Exhibit 6 contains a report from Mr. Joel Hall, General Manager, describing his dealings with Fox.[26]

WAGA is the Fox station serving the Atlanta DMA Fox Television Stations, Inc. owns WAGA. Fox is expressly tying retransmission consent for WAGA to carriage on Plantation's small system three Fox affiliated channels on Plantation Cable's small system – Fox Sports Digital Atlantic, Fox Sports Digital Central, and Fox Sports Digital Pacific. Mr. Hall states correctly, that Congress did not intend retransmission consent as a vehicle for broadcasters and satellite programmers to decide what stations his customers see.[27] Rather, "our customers should have the right to choose what stations they would like to see."[28]

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[26] Exhibit 6, letter dated November 19, 2002, to Ms. Emily Denney, Cinnamon Mueller, from Mr. Joel Hall, General Manager, Plantation Cablevision, Inc.

[27] *Id*

[28] ***id.***

Cannon Valley/KMSP and WFTC – Minneapolis/St. Paul

Cannon Valley Cablevision operates small systems serving about 2,000 subscribers in nine rural communities within the Minneapolis-St. Paul DMA. Mr. Scott W. Johnson is President of the small system. Exhibit 7 contains Mr. Johnson's report of his dealings with Fox.[29]

KMSP is the UPN station serving the Minneapolis-St. Paul DMA WFTC is the Fox station serving the Minneapolis-St Paul DMA. Both KMSP and WFTC are owned by Fox Television Stations, Inc. To obtain retransmission consent for both stations, Fox representatives have indicated that the system will have to carry Fox satellite services in lieu of "substantial" but unspecified retransmission fees.[30] Without being more specific, the Fox representative stated that fees could reach as high as $1 00 per subscriber [31]

In an attempt to negotiate, Mr. Johnson notified Fox that HITS QT was installed in Cannon Valley's largest system and that the Fox programming was included in that system's lineup.[32] This effectively satisfied the mandates for that system and that system was off the negotiating table. In exchange for this, Mr. Johnson requested a "credit" for existing Fox satellite services that were added the previous year. The

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[29] Exhibit 7, report dated November 25, 2002, from Mr. Scott W. Johnson, President Cannon Valley Cablevision, Inc.

[30] *id*

[32] HITS QT provides a lower cost digital solution for certain smaller systems. See www.hits com.

representative would not negotiate on this point and indicated that Mr. Johnson would have to add an additional Fox service in each of the other systems to avoid paying retransmission fees. Mr. Johnson asked that this proposal be put in writing – as of the date *of* this Supplement, he has received nothing.

Mr. Johnson reports that retransmission consent tying and rising programming costs have raised the costs of basic cable in his systems, and are hurting his company's ability to compete against DBS providers.

Sunflower Broadband/WDAF, Kansas City

Sunflower Broadband operates an independent cable system serving about 30,000 customers in Lawrence, Kansas and surrounding communities. Sunflower Broadband is a family-owned business that has been in operation for over 35 years. Located within the Kansas City DMA, the small system has carried WDAF for many years

Fox Television Stations, Inc. controls WDAF. To obtain retransmission consent for WDAF, Sunflower Broadband management has been directed to deal with executives from Fox Cable Networks. Exhibit 8 contains the retransmission consent proposal received by Sunflower Broadband from Fox Cable Networks for the carriage of WDAF.[33]

The Fox proposal emphasizes the "take it or leave it" explicit tying that has become Fox's standard operating procedure. The document states, "Retransmission consent proposal for Sunflower Cable *shall* consist of both a cable distribution

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[33] Exhibit 8. Fox Cable Networks, Sunflower Cable, Proposal for Retransmission Consent Agreement, November 12, 2002.

agreement and retransmission consent agreement. *Both* agreements will constitute the complete retransmission consent arrangement."[34]

According to Sunflower Broadband management, Fox now requires all negotiations for WDAF to occur through Fox Cable Networks, with WDAF management out of the loop. Sunflower Broadband reports that its customers do not want to pay for the additional programming, and the company is extremely concerned about rising programming costs and increasing cable rates. As a result, Sunflower Broadband may be forced to delete the broadcast signal from its line-up, directly due to the retransmission consent demands of Fox

Chibardun Cable TV Corporation and CTC Telcom/KMSP and WFTC – Minneapolis/St. Paul

Chibardun Cable TV Corporation is a very small company that serves six rural communities. and a total of just 2,000 customers. CTC Telecom serves three coinmunities. with a total of only 1,500 subscribers. Both companies are located within the Minneapolis-St Paul DMA. Mr. Scott Hickok is Plant Manager of both small systems. Exhibit 9 contains Mr. Hickock's letter to a representative at Fox Cable Networks Group, responding to the station's demands for retransmission consent.[35]

KMSP is the UPN station serving the Minneapolis DMA. WFTC is the Fox station serving the Minneapolis DMA. Both stations are owned by Fox Television Stations, Inc. To obtain retransmission consent for both KMSP and WFTC, Mr. Hickok

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[34] *id.* (emphasis added)

[35] Exhibit 9, letter dated November 26, 2002, *to* Ms. Kate Kingsley, Fox Cable Network Group, from Mr. Scott Hickok, Plant Manager, Telephone Cooperative, Inc.

must deal with a representative a? Fox Cable Network Group For consent to carry the affiliated broadcast signals, Fox is demanding that both systems launch an additional Fox affiliated station, such as Fox Sports North or National Geographic, programming that Chibardun Cable customers do not want but will be forced to pay for. Mr. Hickok states that this demand is "unreasonable and borders on extortion."

City of Wyandotte, Michigan

The City of Wyandotte, Michigan, operates a small cable system within the city limits. The Wyandotte Municipal Service Commission is the public body responsible overseeing the system Wyandotte falls within the Detroit DMA. WJBK, owned by Fox Television Stations, Inc . is the Fox station in the Detroit DMA

Exhibit 10 contains the text of Resolution 11-2002-04 adopted by the Commission on November 26, 2002.[36] The Resolution describes Fox's explicit tying of retransmission consent for WJBK to carriage by the Wyandotte system of Fox-affiliated satellite channels The Resolution of the Wyandotte Commission succinctly articulates the public interest harm caused by media consolidation and retransmission consent abuse. It states:

> WHEREAS, in the operation of its municipal cable television system the City of Wyandotte is required to negotiate every three years for the right to retransmit certain free, over-the-air local broadcast stations pursuant to the "Retransmission Consent" laws and regulations of the U.S. government; and
>
> WHEREAS, many such free, over-the-air broadcast stations are owned by large media conglomerates that are attempting to use their combined content and market power to force the carriage of additional programming owned by said media conglomerates at the expense of the citizens and

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[35] Exhibit 10, Resolution 11-2002-04, adopted November 26, 2002, City of Wyandotte, Michigan, Municipal Service Commission.

> businesses of the City of Wyandotte; and
>
> WHEREAS, Fox Channel 2 in Detroit is attempting to force the City of Wyandotte to take and pay for an additional channel owned by Fox Channel 2's parent company, Fox Cable Networks, for a period of five to ten years as a condition of allowing Wyandotte's municipal cable system to retransmit Fox Channel 2 to local citizens and businesses for the next three years. and
>
> WHEREAS, the actions of Fox Channel 2 and Fox Cable Networks, if successful, will reduce the choices available to Wyandotte citizens and businesses and increase the cost of basic and/or digital cable television programming services. . .[37]

If any doubt remained about the public interest harms resulting from abuse of retransmission consent by network owners, the Wyandotte resolution should erase it. It is an unequivocal statement concerning the harm of retransmission consent abuse. Moreover, it is the official statement of a public body charged with protecting the public interest on the local level, just as *the* Commission is charged with protecting the public interest nationally.

The eleven examples above, combined with those in the Petition, depict a major problem harming the small cable sector. Small cable operators face overwhelming market power and resources when dealing with media conglomerates like Disney/ABC and Fox/News Corp. These small operators cannot defend against this abuse without help

III. CONCLUSION

The harms of retransmission consent abuse in the markets served by small cable operators are genuine and pervasive and warrant prompt action by the Commission. So long as a handful of media conglomerates can with impunity pull the strings on local retransmission consent and disregard local needs and interests, small cable companies and their customers do not stand a chance

As stated in ACA's Petition, the problem has at least two solutions. (i) self-discipline by network owners and major affiliate groups in dealing with smaller cable companies: or (ii) increased regulation. As this Supplement shows, network owners have failed to restrain themselves yet again.

At a minimum, the inquiry requested in the Petition should begin

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By:________________________

Christopher C. Cinnamon
Emily A. Denney
Cinnamon Mueller
307 North Michigan Avenue
Suite 1020
Chicago, Illinois 60601
(312) 372-3930

Attorneys for the American Cable Association

Matthew M. Polka
President
American Cable Association
One Parkway Center
Suite 212
Pittsburgh, Pennsylvania 15220
(412) 922-8300

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